Supreme Court, U. S.
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No. 79-408

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO SUPREME COURT RULE 35.5

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November 21, 1980

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Pursuant to rule 35.5 of this Court's Rules, Milwaukee draws the Court's attention to a recent decision of the Court of Appeals for the Fifth Circuit in *United States v. Dixie Carriers, Inc.*, decided on October 10, 1980 and published in the Environmental Law Reporter on November 14, 1980, 15 ERC 1017, because it relates to a matter discussed in Milwaukee's previously filed briefs.

Milwaukee's brief in chief at 28 n.9 and its brief in reply to the briefs of *amici curiae* at 6 stated, as Milwaukee believed, that the legislative history of the Federal Water Pollution Control Act Amendments of 1972 did not mention "federal common law." No opposing brief directly challenged those statements.

However, the above-referenced decision of the Court of Appeals sets forth a quotation that Congressman Dingell inserted in the Congressional Record's report of the House's consideration of the Conference Committee Report on the 1972 date of the passage of the FWPCA amendments. This quotation contains the phrase "federal common law." Congressman Dingell was quoting from a report of the Committee on Government Operations, issued before the 1972 enactment of FWPCA, recommending resort under prior law to such "federal common law" by the Coast Guard in policing oil spills.

The decision deals with the question whether FWPCA provides the exclusive remedy available to the United States to recover expenses incurred in an oil spill cleanup effort. The United States argued that in addition to proceeding under FWPCA, it could also proceed under the federal common law and the Refuse Act of 1899. The Court of Appeals for the Fifth Circuit disagreed and held that the remedy provided in FWPCA was exclusive.

The Court of Appeals noted that the government relied upon the following quotation so appearing in the House records:

> "The Coast Guard should (a) vigorously enforce the Refuse Act of 1899 and the civil penalty provisions of the Water Quality Improvements Act of 1970 against all persons who unlawfully discharge oil into the Nation's waterways, and (b) utilize against unlawful oil dischargers other remedies such as suits under the Federal common law of public nuisance, or for reimbursement of clean up costs, or for damages." ____ F.2d ____, 15 ERC 1017, 1021. (This quotation of the inserted quotation appears in *Legislative History* at 252.)

The Court noted that this quotation dealt with estuaries in and around the State of Washington and did not support the government's position. Milwaukee, too, would note that the subject under discussion when the quotation came into the record was oil spills, and not any of the matters before the Court in this case. The quotation is hardly operative "legislative history" in respect

of the provisions of FWPCA under scrutiny here, and it does not detract from the burden of Milwaukee's positions in this case.

Respectfully submitted,

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